

Outside Counsel

Expert Analysis

Gifts: Validity, Enforceability, Fodder for Litigation

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Gift-giving—a fundamental tool of estate planning—is often fodder for estate litigation. Indeed, litigation is often fueled by issues pertaining to the validity of an alleged gift transaction, including donative intent, undue influence, and delivery. This month's column will address decisions respecting inter vivos gift transactions, providing the practitioner with useful instruction as to their enforceability.

Determining Validity

The month of April saw two decisions in which the validity of purported gifts was the subject of motions for summary relief. As discussed below, the court in *In re Rella*, *NYLJ*, April 10, 2012, at 22 (Sur. Ct. New York County) (Sur. Anderson), granted an application for partial summary judgment and recognized the validity of the alleged gift, while in *In re Goodwin*, *NYLJ*, April 10, 2012, at 31 (Sur. Ct. Suffolk County) (Sur. Czygier), the court granted summary judgment finding the alleged gifts to be invalid, and directed the return of the assets to the decedent's estate.

In re Rella was a contested accounting proceeding in which the executor moved for partial summary judgment dismissing the objections contesting a gift that was made to him several months before the decedent's death.

The decedent died, testate, survived by five children. Her husband had predeceased her in 1992. Pursuant to the terms of her will, the decedent divided her estate equally among four of her children, and named her fifth child, Gilbert Rella (Gilbert), together with Gilbert's daughter, who died during the pendency of the proceeding, as co-executors.

Prior to her death, the decedent purportedly transferred to Gilbert her 50 percent interest in a real estate holding company, the sole asset of which was a business operated by Gilbert. The remaining 50 percent interest in the company had been purchased by Gilbert from the decedent's late father's business partner.

The decedent's transfer of her interest to Gilbert was implemented by her as a corporate officer pursuant to a donative plan crafted by her attorney. A gift tax return was filed in connection with the transaction.

The objectant maintained that the decedent lacked the capacity to effect the foregoing transfer,

and that it was procured by undue influence. The court disagreed.

With respect to the issue of capacity, the court opined that the donee bears the burden of proving by clear and convincing evidence that the donor knowingly made a present transfer of property. This burden is buttressed by the presumption that every individual has capacity, and the law's recognition that mere old age or even mental weakness is not necessarily inconsistent with a lack of capacity to transfer property.

Assessing the record within this context, the court found the deposition transcripts of three disinterested individuals reinforced the presumption of capacity. Notably, the testimony of the decedent's internist of more than 15 years revealed that he had examined the decedent two days before the subject transfer, and had found the decedent to be alert and cogent.

With respect to capacity, the 'Rella' court opined that the donee bears the burden of proving by clear and convincing evidence that the donor knowingly made a present transfer of property.

Additionally, the decedent's attorney of more than 50 years, who had handled the transfer on her behalf, testified that he and the decedent's accountant had met with the decedent to discuss the gifts for two hours, during which time the decedent stated that she had wanted to transfer the property for some time.

Based upon this record, together with the presumption of capacity, the court concluded that Gilbert had established a prima facie case that the decedent had the capacity to make the subject gift. Thereafter, the court noted that the objectants lacked personal knowledge of facts regarding the subject transfer. Moreover, the court found upon review of the objectants' proof, that the objectants had failed to submit any evidence that would create a question of fact regarding the capacity of the decedent to make the subject transfer.

As to the issue of undue influence, the court found that Gilbert had established prima facie that the decedent had made the transfer in issue freely and voluntarily. The court rejected objectants' claims that a confidential relationship existed between Gilbert and the decedent, as well as objectants' contention that an inference of undue influence arose by virtue of

the fact that Gilbert was present for a part of the time that the decedent had discussed the subject gift with her attorney and accountant. Significantly, the court concluded that any inference of undue influence in this regard was countermanded by the fact that the professionals were the decedent's long-time advisers. Indeed, the court found none of the indicia of undue influence present; there was no evidence that Gilbert had isolated the decedent from family and friends, nor was there proof that the decedent was so dependent upon Gilbert as to be subject to her control.

Accordingly, based on the totality of evidence, partial summary judgment was granted in the executor's favor.

Before the court in *In re Goodwin* was a motion for summary judgment in a proceeding by the decedent's son, pursuant to SCPA 2105, to discover and compel the turnover of property withheld by the decedent's daughter, the executrix of the estate. In support of the application, the petitioner alleged that the executrix, while acting as the decedent's attorney-in-fact, made certain transfers of the decedent's money to various bank accounts held jointly between herself and the decedent in violation of her fiduciary duties. Notably, the subject powers of attorney were silent as to the gift-giving authority of the agent.

In opposition to the motion, the executrix alleged that the transfers in question were made in accordance with the decedent's directives and in the decedent's best interests. Indeed, the executrix maintained that it was the decedent's intention to transfer all of her assets to her, as evidenced by the uncontested transfer of decedent's home to her during the decedent's lifetime.

Although the executrix provided the court with a copy of the deed relative to this transfer, the court noted that the attorney who prepared the deed, a disinterested witness to the transaction, had failed to provide any information as to the circumstances surrounding the transfer. Further, the executrix alleged that the decedent was mentally capable of making decisions, and was generous with her assets, as reflected in the gifts she had made to the petitioner.

In reply, the petitioner claimed that the decedent suffered from dementia at the time the transfers were made, and submitted the decedent's medical records in support. In addition, the petitioner submitted a copy of a family contract that revealed that the subject transfers were made in order to qualify the decedent for government programs, that the assets thereof were to be for the sole benefit of the decedent, and that the funds were to be distributed at her death pursuant

to the terms of her will. The agreement was signed by the executrix.

The court opined that gifts and pre-death transfers made by an agent to herself as power of attorney generally carry with them a presumption of impropriety and self-dealing that can be overcome by a clear showing of intent on the part of the principal to make the gift. Further, any such gifts must be made subject to the principal's best interests to carry out her "financial, estate or tax plans." See *Matter of Ferrara*, 7 NY3d 244.

Based upon the record, the court concluded that the petitioner had made a prima facie case in favor of summary judgment. Specifically, the court relied on the presumption of impropriety surrounding the transfers, and the requirement that the transfers be proven in the decedent's best interests. To this extent, the court noted that by signing the family contract, the executrix acknowledged that she would be receiving the decedent's assets and that such assets were not to be distributed to anyone other than the decedent.

The court found that given the proof submitted, the executrix was the primary witness to the facts and circumstances surrounding the subject transfers and her testimony was barred by the Dead Man's Statute. Significantly, the court noted that while it could consider evidence otherwise excludable by the statute in opposition to the motion, the executrix had failed to offer any other corroborating support for her position. Accordingly, the court directed that the assets represented by the transfers in issue be restored to the estate. Further, in light of the facts elicited by the motion, the court directed that the executrix file an account of her stewardship.

Delivery

The element of a delivery, a vital component of a vital gift, proved the dispositive issue in two recent decisions by the Surrogate's Court of New York County.

In *In re Urry*, NYLJ, April 20, 2012, at 22 (Sur. Ct. New York County) (Sur. Anderson), the issue before the court was the validity of a purported "deed of gift" by the decedent's surviving spouse to a trust created for the decedent's son.

The decedent's will left the bulk of her pre-residuary estate to her son from a prior marriage, and directed that the residue thereof be paid over to an inter vivos trust for his benefit. Six months after the decedent's death, her surviving spouse filed a petition for a right of election simultaneously with a "deed of gift" which purported to convey all of his right, title and interest in his elective share to the trust.

The decedent's son sought to enforce the gift; the decedent's spouse opposed, maintaining that because the deed had remained with his prior attorney, delivery of the purported gift was incomplete. The decedent's son responded by producing a copy of the deed, claiming that the original thereof had been given to him by the decedent's spouse, who asked that he make a copy thereof for his records and thereafter return the original to him.

Based on the record, there was no dispute that the decedent's spouse had retained the original deed of gift, and that he, at one time, intended to make a gift of his elective share to the trust created for the benefit of the decedent's son. In view thereof, the decedent's spouse moved for summary judgment.

The court opined that the donee of a purported gift bears the burden of proving each of the elements

thereof by clear and convincing evidence. These elements include intent on the part of the donor to make a present transfer; either actual or constructive delivery of the gift to the donee; and acceptance by the donee. The court found that while the record established an intent to make the gift in question as well as acceptance by the donee, the element of delivery was missing. Specifically, the court concluded that even if a copy of the deed of gift had been given to the decedent's son, the spouse's insistence on retaining the original undercut the claim that he relinquished dominion and control of the property, and that, as such, delivery was complete.

Nevertheless, the decedent's son argued that principles of estoppel precluded the decedent's spouse from claiming a failure of delivery. To this extent, the court noted that a case of equitable estoppel requires proof, by clear and convincing evidence, of three elements: (1) conduct that amounts to a false representation or concealment of material facts; (2) intention, or at least expectation, that such conduct will be acted upon by the other party; and (3) in some instances, knowledge, actual or constructive, of the

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real facts. Within this context, the court concluded that the record was devoid of any facts to support a claim based on equitable estoppel.

Similarly, the court found that the petitioner had failed to sustain a claim based upon promissory estoppel. The court opined that the elements of a claim based on promissory estoppel are: (1) a clear and unambiguous promise, (2) reasonable and foreseeable reliance by the party to whom the promise is made, and (3) injury sustained in reliance on the promise. Based on the record, and more particularly, the fact that the decedent's spouse had retained the original deed, and filed his right of election simultaneously with the "deed of gift," the court concluded that the alleged promise by the decedent's spouse was not unambiguous. Further, the court held that the decedent's spouse could not have reasonably foreseen any action or change in circumstances by the decedent's son in reliance on the alleged promise.

Accordingly, based on the foregoing, the court granted the application for summary judgment by the decedent's spouse, and dismissed the petition by the decedent's son.

In *In re Eisenberg Revocable Trust*, NYLJ, March 26, 2012, at 41 (Sur. Ct. New York County) (Sur. Glen), the court also addressed the element of delivery in the making of a valid gift. The issue before the court, raised within the context of an accounting proceeding with respect to the decedent's revocable trust, was whether the decedent's companion had sufficiently established that delivery of two purported gifts, totaling \$3 million, had been made to her by the decedent from the trust.

One such gift, amounting to \$2 million, was based on two recorded conversations that the decedent had with his banker, in which the banker explained to the decedent that instructions for any gift of monies deposited with the bank would have to be in writing. The other gift, amounting to \$1 million, was based on a "deed of gift" signed and given by the decedent to his companion prior to his death.

The trustee of the trust moved for summary judgment, and the companion opposed. The court granted the motion finding that the element of delivery had not been sufficiently established with respect to either of the alleged gifts. In reaching this result, the court opined that due to the inherent susceptibility of gift transactions to fraud or mistake, particularly after the death of the donor, the law imposes a rigorous standard in assessing the element of delivery required for a valid gift.

A finding of delivery requires that the donor divest himself of full control over the property that is the subject of the gift. As such, the court noted that a gift of stock generally requires a transfer of the shares on the books of the corporation, and a gift by check requires payment by the bank before the death of the donor. The death of the donor before payment revokes the authority of the depository bank to issue payment on the donor's account.

On the other hand, because proof of delivery can be difficult, in order to avoid inequities, courts will recognize, in certain circumstances, symbolic or constructive delivery in lieu of physical delivery. Nevertheless, even in such circumstances, the delivery required must be such as to best accommodate the nature and situation of the property and the parties to the transaction.

Assessed within this context, the court found that the alleged \$2 million gift had never been delivered by the decedent as the funds remained in the decedent's trust account and were consistently subject to his dominion and control. The court concluded that the taped conversations did not establish constructive delivery of the property under the circumstances. Moreover, with respect to the alleged \$1 million gift, the court again found that no delivery had occurred.

The court reasoned that actual delivery of the property, securities and cash, could have been made, especially given the length of time between the date on the "deed of gift" and the decedent's date of death. Further, the court held that the "deed of gift" was invalid due to its failure to describe the subject matter of the gift, i.e., instructions as to the intended source of the gift.